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In The

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

vs.

VINCENT J. PINETTE, DONNIE A. CARR and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE TOWN OF TRUMBULL, CONNECTICUT AND THE CONNECTICUT CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The Town of Trumbull, Connecticut ("the Town"), a political subdivision of the State of Connecticut, is presently a defendant-respondent in a closely similar lawsuit in which the plaintiffs — having lost at the district and circuit court levels — have petitioned this Court for certiorari. *Knights of Columbus No. 2961 et al. v. The Town of Trumbull, Connecticut, et al.*, No. 94-1241. The issue in *Knights of Columbus* is essentially the same as the one at bar: namely, whether the First Amendment's Speech Clause requires, and the Amendment's Establishment Clause permits, a government agency to let a private entity display a solitary, unattended religious symbol in a traditional public forum that abuts a core government building, when the forum is open to privately-sponsored unattended non-religious symbols.[2] Thus, the outcome in the present case could have a significant impact upon — and indeed could control — the outcome in *Knights of Columbus*.

The Connecticut Civil Liberties Union Foundation ("CCLUF") is the litigative arm of the Connecticut Civil Liberties Union, a state affiliate of the American Civil Liberties

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1. Under Rule 37.5, it is not necessary for the parties to consent to the filing of this Brief by the Town of Trumbull, as the Town is a subdivision of the State of Connecticut and the Brief is submitted by its authorized law officer. As to the Connecticut Civil Liberties Union Foundation, the Respondents' blanket consent to all amicus filings has been lodged with the Clerk's office, and Petitioners' Counsel Andrew I. Sutter has represented to the amici that the Petitioners' consent will be lodged forthwith.

2. Indeed, *Knights of Columbus* presents this issue in even more pristine form, because the Trumbull Town Hall Green — the situs of the controversy — is not open to the display of *any* solitary unattended religious symbol; the symbol that the plaintiffs wish to display (a creche) is a seasonal one; and the plaintiffs do not allege that the Town denied permission to display the symbol out of hostility to the sponsor's political views. Given these factual differences, this Court could actually decide the present appeal without reaching the certified issue.

Union, which is a national non-partisan organization of approximately 250,000 members committed to protecting the civil rights and liberties — and in particular the First Amendment rights and liberties — of all persons. CCLUF has participated, as direct counsel or *amicus,* in the litigation of numerous cases involving speech and religion clause rights in Connecticut's federal and state courts, and appeared as *amicus curiae* in *Knights of Columbus,* before the district court, in support of the Town. CCLUF believes that, because public parks and streets are traditionally and universally known to be public forums, ordinarily there is no Establishment Clause violation when they are used for activities or speech with a religious content. However, CCLUF also believes that the placement of a *solitary, unattended* religious symbol in a park adjacent to a *core government building* is not an ordinary use, but rather suggests official endorsement of the religious message, and that the Sixth Circuit, by holding otherwise, gave insufficient weight to the Establishment Clause values in the case. Accordingly, CCLUF joins the Town of Trumbull in supporting the Petitioners and in urging that the judgment be reversed.

STATEMENT OF THE CASE

The *amici* adopt the Statement of the Case in the Petitioners' Petition For a Writ of Certiorari, pages 4 through 9.

SUMMARY OF ARGUMENT

The Sixth Circuit erred at the outset by applying a categorical rule which elevates speech rights above non-establishment rights. Since these rights stand — like all First Amendment rights — on an equal footing with one another, the court should have undertaken, instead, to strike a balance between the two, giving close attention to context.

Had the Sixth Circuit applied such a balancing test, as it ought to have done, the balance would have tilted, in this case, in

the Petitioners' favor. The Respondents' expressive interests are at best minimal, because the ability to leave a symbol unattended merely "facilitates" the expression; it does not enhance the symbol's expressive content. Their expressive interests are further diminished by the fact that there is no inherent right to place an unattended symbol in any forum, even a traditional public forum. Indeed, a speaker has no more right to display such a symbol than to demand that the government subsidize his expression with cash.

On the Establishment Clause side, the endorsement test, which a majority of this Court has adopted in the past and which the Court should use in this case, requires only that a reasonable person be capable of inferring endorsement or disapproval from the government's actions; not that all reasonable persons would necessarily do so. The very split among the Circuits, on the question of whether accommodating unattended and solitary religious displays in front of core government buildings violates the Establishment Clause, suggests that the perception of endorsement or disapproval is not unreasonable. The endorsement concerns are exacerbated by the fact that most unattended displays are likely to be (and indeed have been) religious, and by the further fact that governmental accommodation of unattended displays operates very much like a cash subsidy. It is no answer to say that the unwilling viewer can simply turn away, for the Establishment Clause's unique prohibition on religious speech lifts this burden from the viewer's shoulders. Finally, it is incorrect to argue that unattended displays are less likely to convey endorsement than are time-honored practices such as legislative prayer and presidential proclamations of prayer; on the contrary, such displays are far likelier to do so.

ARGUMENT

I.

THE SIXTH CIRCUIT ERRED BY CATEGORICALLY SUBORDINATING THE ESTABLISHMENT CLAUSE TO THE SPEECH CLAUSE INSTEAD OF STRIKING A CAREFUL CONTEXTUAL BALANCE BETWEEN THE TWO.

The Sixth Circuit's error originates in its adoption of a categorical rule which assumes, in essence, that speech values trump non-establishment ones on all public forum property. This assumption is incorrect. Though First Amendment rights as a whole occupy a "preferred position" in relation to other constitutional rights, no single First Amendment right is "preferred" to any or all of the rest.

> [It] may be doubted that any of the great liberties insured by the First Amendment can be given higher place than the others. All have preferred position in our basic scheme. *Schneider v. State,* 308 U.S. 147; *Cantwell v. Connecticut,* 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings.

Wallace v. Jaffree, 472 U.S. 38, 50 n.35, *quoting Prince v. Massachusetts,* 321 U.S. 158, 164 (1944) (quotation marks omitted). On the same page, *Wallace* explains the "unity" as follows: "the individual's freedom of conscience [is] the central liberty that unifies the various Clauses in the First Amendment."

Id. In other words, the Establishment Clause, no less than the speech clause, serves to protect society's "marginal voices." *International Society For Krishna Consciousness v. Lee,* 504 U.S. ___, 112 S. Ct. 2701, 2720 (Kennedy, J., concurring).[3]

Once it is understood that all First Amendment rights stand on the same footing, it follows that the proper course, when they collide, is not to subordinate one to the other. Rather, courts should strike careful balances, with close attention to context. Indeed, this Court has called for fact-sensitive balancing even when First Amendment speech rights clash with non-First Amendment rights. *See, Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984); *Nebraska Press Association v. Stuart,* 427 U.S. 539, 561, 570 (1976); *Simon and Schuster, Inc. v. New York State Crime Victims' Board,* 502 U.S. ___, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring). Such balancing is all the more imperative, therefore, when First Amendment rights clash with one another. *Burson v. Freeman,* 503 U.S. ___, 112 S. Ct. 1846, 1859 (1992) (Kennedy, J., concurring) (speech versus voting rights).[4]

The Sixth Circuit's categorical approach is thus in error. In the remainder of this Brief, the *amici* will show that if the court had balanced speech and non-establishment rights, as it ought to have done, it would have ruled in the Petitioners' favor.

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3. For other decisions harmonizing, and thereby equating, the First Amendment's various clauses, *see Employment Div., Ore. Dept. of Human Resources v. Smith,* 494 U.S. 872, 886 n.3 (1990) (Speech and Free Exercise Clauses); *McDonald v. Smith,* 472 U.S. 479, 482 (1985) (Speech and Petition Clauses).

4. As a general matter, moreover, Establishment Clause jurisprudence "is necessarily one of line-drawing," *Lee v. Weisman,* 504 U.S. ___, 112 S. Ct. 2649, 2661 (1992) — a process which is the direct antithesis of the categorical technique which the Sixth Circuit embraced.

II.

ON BALANCE, THE ESTABLISHMENT CLAUSE FORBIDS THE DISPLAY OF SOLITARY, UNATTENDED RELIGIOUS SYMBOLS — EVEN PRIVATELY SPONSORED ONES — IN PUBLIC FORUMS THAT ABUT CORE GOVERNMENT BUILDINGS.

This section of the Brief will apply the balancing process which the case requires against the backdrop of the endorsement test which a majority of this Court used in *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389-92 (1985), and again in *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573, 592-94 (1989). For the most part the *amici* will leave to the Petitioners and other *amici* — *e.g.* Americans United For Separation of Church and State — the task of explaining the reasons (including but not limited to *stare decisis*) why that test is the proper one, especially in cases involving the public display of religious symbols.[5]

In Part 1 of the Section, the *amici* will show that a speaker's expressive interest in displaying an unattended, as opposed to an attended, symbol is minimal to non-existent. In Part 2, they will show that the countervailing endorsement concerns, on the Establishment Clause side of the equation, are powerful and overriding.

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5. "As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Allegheny County,* 492 U.S. at 668 (Kennedy, J., concurring). *Accord, Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. ___, 112 S. Ct. 2791, 2808-09 (1992).

A. A Speaker Has No *Expressive* Interest In Displaying an Unattended, As Opposed To an Attended, Symbol.

A speaker simply has no *expressive* interest in displaying an unattended, as opposed to an attended, symbol. Rather, the only interest is "facilitative." *Clark v. Community For Creative Non-Violence,* 468 U.S. 288, 296 (1984). Leaving the symbol unattended makes it easier, more convenient, and more comfortable to display the symbol, especially overnight or in inclement weather. But it does not enhance the symbol's *expressive* content, any more than sleeping overnight at the site of the demonstration enhanced the expressive content in *Clark.* As *Clark* squarely holds, this Court attaches little or no weight to a merely "facilitative" interest in a particular manner of expression.

Indeed, the absence of a live speaker, in the present case, could actually detract from the message that the symbol's sponsors seek to convey, which is that they themselves — not government officials — are "expressing respect for the holiday season and [asserting] the right of all religious views to be heard." *Pinette v. Capitol Square Review and Advisory Board,* 844 F. Supp. 1182, 1183-84 (S.D. Ohio 1993) (Finding of Fact no. 11). By suggesting government sponsorship, an unattended religious symbol next to a core government building obscures and distorts that message.

Because the expressive benefits of unattended symbolic speech are so marginal, there is no inherent right to display such symbols even in traditional public fora. That is the clear import of *City Council v. Taxpayers For Vincent,* 466 U.S. 789 (1984), where this Court upheld an ordinance that banned the posting of signs on public property. Though the opinion observed that utility poles (where the speakers wished to display their signs) were non-fora, *id.* at 814, it is quite evident that the ban would have survived time, place and manner analysis even if the Court had

characterized the forum as consisting of the municipal streets and sidewalks where the poles stood. *Id.* at 813-15.[6] The absence of any inherent right to display unattended exhibits, even in traditional public fora, has three distinct consequences that are germane to this lawsuit.

First: it is further evidence that the speaker's interests are of little or no weight.

Second: because one may erect unattended displays only when the government voluntarily allows such displays, the appropriate analysis in this case is really that of the non-forum or possibly the designated forum, even though the situs is a traditional forum for purposes of live speech.[7] The non-forum methodology is probably more appropriate, for while the opinions below mention some instances in which the situs

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6. The speaker's interests in *Vincent* were actually much stronger than in the case at bar. For one thing, the signs in that case comprised pure speech, not symbolic; for another, the City, by banning such signs, at least arguably closed down a "discrete medium of expression." 466 U.S. at 815 n.32 In *City of Ladue v. Gilleo,* 514 U.S. ___, 114 S. Ct. 2038, 2045 (1994), this Court only last term held such closures suspect.

7. Interestingly, a United States district judge, in *Flamer v. City of White Plains,* 841 F. Supp. 1365, 1374 (S.D.N.Y. 1993), criticized the Second Circuit for having "conflate[d]" so-called limited forums with traditional forums in *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990) — the decision which committed that Circuit to the view that unattended solitary religious displays which stand next to core government buildings invariably violate the Establishment Clause. The "confla[tion]" occurred, according to *Flamer,* because *Kaplan,* though it did not use limited forum vocabulary, nevertheless focused on whether the municipal defendant had opened its Town Hall park to the display of unattended symbols. Indeed *Kaplan* "conflate[d]" the two forums — but the "confla[tion]" does not reflect error, ambiguity or confusion on *Kaplan's* part. Rather, it recognizes that a traditional forum, which is open by right only to live speakers, may be further opened, by voluntary government action, to additional speech uses.

accommodated unattended exhibits, 844 F. Supp. at 1184, Finding of Fact no. 13, those instances seem too few and too isolated to show that the Petitioners have intentionally "designated" the property for such uses. *See, Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 790, 802 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47-8 (1983).[8] It is ultimately unnecessary, however, for the *amici* to assign one label or the other, or to answer the unresolved question of whether the government may "limit" a designation to as few or as many topics as the government wishes. *See, Lamb's Chapel v. Center Moriches Union Free School District,* 509 U.S. ___, 113 S. Ct. 2141, 2146 (1993). What matters for present purposes is that, under either analysis, this Court's cases accord considerable deference to governmental decisions as to what voluntary expressive uses the government is willing to countenance, provided that the decisions are rational and viewpoint neutral. *Lamb's Chapel,* 113 S. Ct. at 2147; *International Society For Krishna Consciousness v. Lee,* 112 S. Ct. at 2705-06. That deference, in combination with the low incremental value of unattended symbolic speech and the endorsement concerns which the *amici* will discuss below,

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8. In fact, the only arguably unattended "expressive" symbols to appear on the property, other than religious symbols, were a United Way campaign thermometer and a Christmas tree (assuming the latter to have been privately rather than government-sponsored). 844 F. Supp. at 1184, Finding of Fact no. 13. As for the "craftsmen's booths and displays" which the Finding describes, these necessarily would have been attended much of the time, and in any event do not appear to have been "expressive" in the First Amendment sense of the term. This sparse history no only militates against any suggestion that the Petitioners have opened the property to general use by sponsors of unattended symbols but — because the few such symbols that have appeared have been predominantly religious — raises endorsement concerns which the *amici* will discuss in Part 2 of this Section.

should support the Petitioners' refusal to allow the Respondents' cross.[9]

Third: since the government is under no constitutional duty to countenance unattended expressive symbols on its property, if it does make property available for the display of such symbols, its decision to do so is really in the nature of a subsidy. This Court, of course, is considering right now the Speech and Establishment Clause ramifications of the government's refusal to extend generally available subsidies to religious speech. *Rosenberger v. Rector and Visitors of the University of Virginia,* 18 F.3d 269 (4th Cir. 1994), *cert. granted,* 115 S. Ct. 417 (1994). In the next subsection of this Brief, the *amici* will discuss the Establishment Clause implications of that issue in more detail. On the speech side, suffice it to say that because the First Amendment creates no entitlement to government subsidies, *see, Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), the Respondents' speech interests, once again, are constitutionally insignificant.

For all of these reasons, this Court should attach little if any weight to Respondents' desire to facilitate their symbolic religious expression (which the First Amendment assuredly

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9. The display of a menorah on the same property is at first glance troubling, since it suggests viewpoint discrimination within a genre of permitted speech. *See, Lamb's Chapel,* 113 S. Ct. at 2147-48. Conjoined as it was with a Christmas tree, however, 30 F.3d at 676, the menorah may well have conformed to the requirements in *Allegheny County.* That would differentiate it, in genre, from the cross. If, on the other hand, it did not conform to *Allegheny,* then it, no less than the cross, violated the Establishment Clause, in which case this Court should not remedy a past constitutional wrong by countenancing another. This problem, incidentally, does not exist in the Town of Trumbull's *Knights of Columbus* case, for there the property is closed to all unattended religious symbols. *Knights of Columbus Council No. 2961 v. The Town of Trumbull, Connecticut et al.,* Civ. No. 3:94CV2143(AHN) (D. Conn. Dec. 20, 1994), Memorandum of Decision at 5, Finding of Fact no. 16.

would protect, and which the Petitioners presumably would accommodate, if a live sponsor were present) by leaving the symbol unattended. The *amici* will now show that this desire, besides carrying little or no weight, creates Establishment Clause (*i.e.*, endorsement) concerns of the highest order.

B. The Endorsement Concerns Which This Court Should Balance Against the Speaker's Minimal Expressive Interests Are Powerful and Overriding.

The Sixth Circuit, and apparently the Respondents, take the position that a privately-sponsored religious symbol in a public forum can never convey a message of official endorsement of religion. This is because, in their view, a reasonable person who sees the display will understand that the government maintains an open-forum policy and that the display therefore represents only the opinions of the private sponsor. *Pinette v. Capitol Square Review and Advisory Board,* 30 F.3d 675, 679 (6th Cir. 1994). This facile dismissal of endorsement concerns misperceives what endorsement means.

According to the endorsement test, the Establishment Clause does not merely prohibit government from taking "a position on questions of religious belief," *Allegheny County,* 492 U.S. at 593-94; it prohibits government from even "*appearing*" to do so. *Id.* (emphasis added, citation omitted). Moreover, the key determinant of whether the appearance arises is whether "the challenged governmental action is sufficiently *likely* to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices," and not whether the perception is inevitable or indisputable. *Id.* at 597 (citation and internal quotes omitted, emphasis added). Thus, it is not necessary that a reasonable observer *would* perceive the governmental action as connoting endorsement or disapproval, for reasonable people will often differ; rather, the government has erred whenever a

reasonable person *could* perceive its action as connoting endorsement or disapproval. *Id.* at 642-43 (concurring opinion of Justices Brennan, Marshall and Stevens). *Cf., Lee v. Weisman,* 112 S. Ct. at 2658, which agrees that — whether the test be endorsement or coercion — the controlling issue is what a reasonable person *could* perceive and not what she necessarily *would* perceive.

The Fourth and Second Circuits have squarely held, and the Seventh has intimated, that solitary, unattended, privately-sponsored religious symbols in front of core government buildings — with or without accompanying disclaimers — appear (or at least could reasonably be seen to appear) to carry government approval. *Smith v. Albemarle County,* 895 F.2d 953 (4th Cir.), *cert. denied,* 111 S. Ct. 74 (1990); *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990); *Doe v. Small,* 964 F.2d 611, 619 (7th Cir. 1992) (en banc). To be sure, two Circuits have found no endorsement: the Sixth, in its opinion below, and Eleventh, in *Chabad-Lubavitch of Georgia v. Miller,* 5 F.3d 1383 (11th Cir. 1993) (en banc). But this very division among the Circuits suggests that reasonable people could indeed perceive endorsement. Otherwise, one must ascribe to three federal circuits, as well as to the successful litigants, not merely misperception, but utter unreason.

The endorsement concerns in this case are magnified by two factors. One is the likelihood that the great majority of unattended expressive symbols in public fora will, in fact, be religious: a likelihood that the record below confirms. The district court mentions just two privately-sponsored unattended displays besides the menorah and the creche: a United Way thermometer and craft booths at an art festival. *Pinette v. Capitol Square Review and Advisory Bd.,* 844 F. Supp. 1182, 1184 (S.D. Ohio 1993), Finding of Fact no. 13. Of these, only the thermometer is even arguably expressive. *Pinette* is not unique in this regard;

cases from other circuits reveal similar patterns.[10] In *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), the Court qualified its holding by intimating that the outcome would have been different had there been "empirical evidence that religious groups will dominate . . . [the] open forum" — and *Widmar* involved live speakers, whose presence mitigated endorsement concerns at least to some extent. The case histories in the Sixth Circuit and elsewhere contain ample "empirical evidence" of religious domination to satisfy the *Widmar* exception.

The endorsement dangers are exacerbated, in *Pinette*, by a second factor: namely, that (as the *amici* have demonstrated above) governmental accommodation of semi-permanent unattended exhibits operates very much like a cash subsidy. The issue in this case, therefore, begins to resemble the one in *Rosenberger, supra*: that is, when the government voluntarily subsidizes non-religious activity, does the Speech Clause require it, or does the Establishment Clause forbid it, to subsidize religious activity as well? But the Establishment Clause concerns, in *Pinette*, are far greater than in *Rosenberger*. For one thing, there are manifest differences between a journal and a purely religious symbol, because a journal is likelier to convey diffuse messages. For another, the journal's readers may not even be aware of the subsidy, whereas when unattended and solitary religious symbols appear on government property in close

10. In the *amici's* own case, *Knights of Columbus*, Civ. No. 3:94-CV2143 (AHN), no unattended symbols had ever been displayed on the property, as far as the record reveals. Memorandum of Decision at 11, Finding of Fact no. 11. The same was true in *Doe v. Small*, 964 F.2d at 614. In *Smith v. Albemarle County*, the only unattended display, besides the religious one, had been a United Way thermometer. 895 F.2d at 955. In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d at 1383, the court mentions just three other unattended exhibits: an Indian hut during Indian Heritage Week, a 35-flag display during International Week, and a 41-poster exhibit by the Atlanta Jewish Federation; of these, only the latter appears to have been "expressive" in the First Amendment sense.

proximity to core government buildings, the church-state relationship is apparent for all to see. And of course, there were many more non-religious uses in *Rosenberger* than there are, or are ever likely to be, in the case at bar. 18 F.3d at 271; *see, Widmar,* 454 U.S. at 274.

It is no answer to say, as some Justices have argued, that those who do not want to see religious display can simply turn away from it. *Allegheny County,* 492 U.S. at 664 (dissenting opinion of Justice Kennedy, joined by the Chief Justice and Justices White and Scalia). That, to be sure, is the proper answer to those who take umbrage at *non-religious* expressive displays on government property. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210-11 (1975); *Cohen v. California,* 403 U.S. 15, 21 (1971). But the balance between speech rights and unwilling audience rights is unaffected, in those cases, by the Establishment Clause's unique prohibition on any religious speech that can reasonably be imputed to the government. This unique prohibition, and its underlying solicitude for impacts on "marginal voices," *International Society For Krishna Consciousness v. Lee,* 112 S. Ct. at 2720 (Kennedy, J., concurring), alters the balance, for once the non-adherent receives the endorsement message, that message is not soon forgotten.

Some Justices have also questioned the endorsement test itself, on the ground that the test, if honestly applied, would require the Court to invalidate long-accepted practices such as legislative prayer, *Marsh v. Chambers,* 463 U.S. 783 (1983), and presidential prayer proclamations. *Allegheny County,* 492 U.S. at 670-74 (dissenting opinion of Justice Kennedy, joined by the Chief Justice and Justices White and Scalia); *Lee v. Weisman,* 112 S. Ct. at 2679-80 (dissenting opinion of Justice Scalia, joined by the Chief Justice and Justices White and Thomas). But in truth the prayers and proclamations are far more innocuous, for they

involve live speakers, are easily avoidable, and in any event are short-lived; they are, on these accounts, *de minimis*. *Lee v. Weisman*, 112 S. Ct. at 2670 n.3, 2678 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor).

In contrast, religious symbols on government property are powerful, unavoidable, and semi-permanent. When such symbols are unattended, and stand in close proximity to government buildings, they have a particular propensity to suggest a " 'symbolic union of church and state,' " *Lee v. Weisman*, 112 S. Ct. at 2672 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor), and thereby to alienate and intimidate society's "marginal voices." *International Society For Krishna Consciousness v. Lee*, 112 S. Ct. at 2720 (Kennedy, J., concurring). If the private exhibitors of these symbols truly do not wish to convey such a message — if they desire, instead, that their religious expression be perceived as their own — then the absence of a live sponsor in no way enhances that expression and indeed can obscure and distort it. *See*, Section IV-B-1, *supra*. And if the exhibitors do wish to convey such a message, the short answer is that this is not the sort of message which the Establishment Clause tolerates. *Lee v. Weisman*, 112 S. Ct. at 2678 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor).

In sum, the speech rights which the speaker asserts in this case are marginal to nil, and there is significant potential for creating the appearance that the government is endorsing religion. In the circumstances, therefore, the speech values must yield to the non-establishment ones and the display should be disallowed.

CONCLUSION

For all the above-stated reasons, the judgment of the Sixth Circuit should be reversed, and the case should be remanded with instructions to dismiss the Respondents' Complaint.

Respectfully submitted,

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